United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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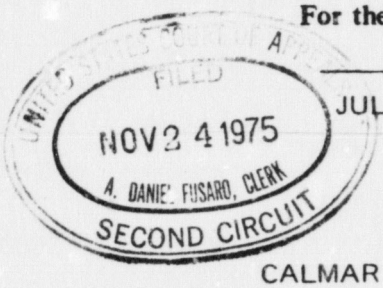
75-7456

United States Court of Appeals

For the Second Circuit.



JULIO EVANS,

Plaintiff-Appellant,

-against-

CALMAR STEAMSHIP CO.,

Defendant-Appellee,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Appellant's Brief

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United States Court of Appeals

FOR THE SECOND CIRCUIT

JULIO EVANS,

Plaintiff-Appellant,

-against-

CALMAR STEAMSHIP CO.,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

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PLAINTIFF-APPELLANT'S BRIEF

This is an appeal by the plaintiff from a judgment in his favor in the amount of $40,000 entered on May 14, 1975 (A-15) following a jury verdict in his favor in the amount of $60,000 rendered on October 3, 1974 and an order of remittitur of the Honorable Gus J. Solomon dated January 14, 1975 (A-2).

FACTS

On May 21, 1968, plaintiff twisted and struck his left knee in order to avoid falling into an open hatch on the SS Calmar (43-44). His knee swelled up (48), but he was able to continue his duties on board the ship, after being seen by a doctor two days later (50). He applied hot towels to his knee (50) and was seen at the Public Health Service Hospital at the next port, Baltimore, Maryland (51).

Although the swelling diminished, within a few weeks the knee

started to give way on him, causing him on some occasions to fall (51, 53). One such fall occurred on the Calmar, causing an injury to Evans' right knee on June 14, 1968 and requiring additional medical attention (53-55). Plaintiff left the Calmar on August 29, 1968. He reported to the U.S. Public Health Service Clinic in New York City on August 30, 1968 and was given cortisone injections (57). He rested at home for a while, but when he returned to work his knee pained him and gave way on him (58). He continued to treat himself with local heat (58). He returned to the New York Clinic on May 2, 1969, where continued heat and aspirins were prescribed (59).

When he rested the knee, it felt better (59) but with heavy work it got worse and would lock on him (60). He worked as bosun at the time of his accident and was still working as bosun two years later while on another ship named Seatrain Delaware for a three months period (60-61). After one month on this job he returned to the Public Health Clinic in New York where he was told to continue the heat and was given some medication (61). Two months later he had to leave the Seatrain Delaware, and this time he was given a course of whirlpool treatment lasting about five weeks (61). Since that time he gave up sailing as bosun, and only worked as A.B., a lower-paying but somewhat lighter job (62).

In September, 1971 plaintiff was examined in connection with this case by two orthopedic surgeons. Dr. Irving Mauer diagnosed plaintiff's condition as an internal derangement of the left knee involving the anterior attachments of the medical meniscus (90-92). Dr. Rizzo, who examined on behalf of defendant at the same time, found no definite evidence of a meniscus injury, although he did not perform a McMurray's test. Dr Mauer had found a positive McMurray's sign (90) in addition to other positive findings.

In March of 1974, while the plaintiff was hospitalized at the U.S. Public Health Service Hospital in Staten Island for investigation of certain complaints concerning his prostate, he was

seen in orthopedic consultation and submitted to orthopedic conference with regard to his left knee (A17). Based upon plaintiff's history of injury to the left knee in 1958 with subsequent episodes of the knee locking and giving way on him, and upon tenderness on the joint line and positive McMurray's findings, the orthopedic consultants at the Staten Island hospital were of the opinion that plaintiff was suffering from a tear of either the medial or the lateral mennscus, or both. The hospital records (A22) reveal that the operative plan was to explore the lateral compartment first, and if no meniscus tear was found there, then to explore the medial compartment. A tear was found of the lateral meniscus which was repaired. Therefore the medial compartment was never explored.

Following the surgery, the plaintiff experienced severe problems with urinary retention for which he was given medication and catheterized. About 10 days following the operation, he was found to have suffered a myocardial infarct (heart attack) (161). Both the urinary retention and the myocardial infarct were noted on the discharge note on page 53 of the Staten Island record to have been postoperative complications (103-104). (A29)

Plaintiff was 57 years old at the time of the trial (26). Before the accident of May 21, 1968, he was in excellent physical condition (66). Now, he is unable to work as a seaman, and the probability is that he will never be able to do so (105). His earning capacity as a bosun was approximately fifteen hundred dollars per month (68).

THE PROCEEDINGS BELOW

Suit was commenced in the United States District Court for the Southern District of New York on October 13, 1970. Issue was joined on December 20, 1971.

The case was assigned for trial before Judge Gus J. Solomon, Sr., sitting by Special Assignment in the Southern District of

New York, and a trial was held on October 2 and October 3, 1974, resulting in a verdict for the plaintiff in the amount of $60,000, of which $5,000 represented loss of earnings up to the trial, and $55,000 for pain and suffering past and future, permanent injury and loss of earning capacity (A21 . On October 16, 1974 defendant moved for judgment notwithstanding the verdict or a new trial (A4-A6). On January 14, 1975, the Court entered an order denying defendant's motion, provided plaintiff consent to a remittur of $20,000, or else ordering a new trial (A3).

Since the trial minutes had not as yet been transcribed plaintiff's time to make his election was extended (A13). Plaintiff declined the remittitur, and a new trial was ordered on the issue of damages only (A14). On April 23, 1975 the case came on for a new trial before the Honorable John Cannella and a jury. In his opening remarks, Judge Canella explained to the jury that they would decide only the question of damages. Opening statements of counsel covered the question of damages alone. The plaintiff was prepared and testified on this issue alone. On the morning of the second day of the trial, Judge Cannella advised counsel that he was submitting the case to the jury on the issues of both comparative negligence and damages (A34). Plaintiff moved for a mistrial, advising the Court that certain vital exhibits prepared for the first trial regarding the questions of negligence, unseaworthiness and comparative negligence had never been returned to him after the first trial and could not be located.* The motion was denied (A37-A39). It was in this posture of the case that Judge Cannella, with defendant's consent, extended plaintiff's time to accept the remittitur (A48-A50). Plaintiff thereupon accept the remittitur under protest.

QUESTIONS PRESENTED

1. Did the trial court abuse its discretion in granting defendant's motion for a new trial on the issue of damages?

*These remarks were made in the robing room and apparently were not recorded. However, both counsel agree that they were made.

2. Is the order of remittitur and the final judgment entered thereon appealable?

3. Did Judge Cannella abuse his discretion in directing on the second day of the second trial that the jury should consider both damages and comparative negligence, rather than damages alone?

4. Did Judge Cannella have the power to overrule Judge Solomon and order a new trial on comparative negligence.

5. Did Judge Cannella abuse his discretion in refusing plaintiff's motion for a mistrial?

POINT I

THE $60,000 VERDICT WAS NOT EXCESSIVE

The trial court acknowledged that the evidence was sufficient to support the jury's finding of liability and of causal relationship between the full and the subsequent surgery. (A2) Nevertheless, more than three months after the trial, without benefit of any trial minutes, the trial judge reached the conclusion that $40,000 is the most that could be justified under the facts. Such a determination, based as it was on an imperfect recollection of the evidence, was a manifest usurpation of the jury's traditional function in a Jones Act case, and cannot be justified under the evidence.

New trials granted because (1) a jury verdict is against the weight of the evidence may be sharply distinguished from (2) new trials ordered for other reasons: for example, evidence improperly admitted, prejudicial statements by counsel, an improper charge to the jury or newly discovered evidence. In the first instance given it is the jury itself which fails properly to perform the functions confided to it by law. In the latter instances something occurred in the course of the trial which resulted or which may have resulted in the jury receiving a

distorted, incorrect, or an incomplete view of the operative facts, or some undesirable element obtruded itself into the proceedings creating a condition whereby the giving of a just verdict was rendered difficult or impossible. In the latter instances, (2), supra, the trial court delivered the jury from a possibly erroneous verdict arising from circumstances over which the jury had no control. Under these conditions there is no usurpation by the court of the prime function of the jury as the trier of the facts and the trial judge necessarily must be allowed wide discretion in granting or refusing a new trial.

But where no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evidence, the trial judge in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to a jury trial.

Lind v. Schenley Industries, Inc., 278 F2d 79.

As the Court stated in the *Lind* case

> "The jury's main function was to determine the veracity of the witnesses: i.e. what testimony should be believed. If Lind's testimony and that of Mrs. Kennan, Kaufman's secretary, was deemed credible, Lind presented a convincing, indeed an overwhelming case. We must conclude that the jury did believe this testimony and that the court below substituted its judgment for that of the jury on this issue and thereby abused its legal discretion.
>
> "The judgment of the court below will be reversed and the case will be remanded with the direction to the court

below to reinstate the verdict and judgment in favor of Line."

Defendant does not suggest that evidence was improperly admitted or that there were any prejudicial statements by counsel or an improper jury charge. The question is solely one of the sufficiency of the evidence.

The plaintiff respectfully suggests that there was overwhelming evidence to support the jury's verdict. However, it is not the plaintiff's view, or even the Court's view, which is important, because a Court is not free to weigh the evidence and to determine whether or not it would have reached the same conclusion as the trier of facts. If there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion, and it is immaterial that the Court might draw a contrary inference or feel that another conclusion is more reasonable. *Schirra v. Delaware L & W R Co.*, 103 F.Supp. 812, 820.

In ruling on a motion for a new trial based upon insufficiency of the evidence, the evidence and inferences reasonably deducible therefrom must be viewed in the light most favorable to the prevailing party, and the Court must assume that the jury followed the Court's instructions. *Pelham v. Hendricks*, 132 F.Supp. 774, 775. A new trial may not be ordered unless the evidence as a whole, after affording it the highest probative force to which it is lawfully entitled, is insufficient to support the verdict. *U.S. v. 13.40 Acres of Land*, 56 F.Supp. 535, 538.

HOW MUCH PROOF WITH REGARD TO CAUSAL RELATIONSHIP IS REQUIRED IN A JONES ACT CASE?

In *Sentilles v. Inter-Caribbean Shipping Corporation*, 361 US 107, a seaman fell on deck when he was washed by a wave and felt that he inhaled some water. A day or so later, he developed a cough and felt like he had the flu. He left the ship two or three

days later. About 10 days later, because of the persistence of symptoms, he consulted a doctor. He was hospitalized where tests showed that plaintiff, who had been a diabetic for some years, had active pulmonary tuberculosis. The treating doctor indicated that plaintiff had been suffering from a tubercular condition for from one to three years before the accident. He indicated that tuberculosis could be aggravated by a blow to the chest; that it could also be aggravated by diabetes. Another doctor testified that dormant tuberculosis could be activated and aggravated by anything that weakens the body, including physical and emotional trauma, diabetes, malnutrition, etc.

A doctor called by plaintiff who had examined the plaintiff, expressed the opinion that the fall probably aggravated the plaintiff's condition, but admitted that there were other factors which might have caused the aggravation and he had no way of telling which one or all of them might be involved. There was a verdict for the plaintiff, but the Court of Appeals reversed, holding that the medical evidence was not sufficient to establish anything more than a possibility of a causal relationship between the accident and the tubercular condition. In the words of the Court of Appeals, (256 F2d 156, 158)

> "The least that the appellee was required to prove was that the aggravation of his tubercular condition was probably caused by the incident on shipboard. The most that he established was that the incident was a possible cause of the aggravation. This was not enough."

The Supreme Court granted certiorari, and in an opinion by Mr. Justice Brennan, 361 U.S. 107, 80 S.Ct. 173, 175 held:

> "The jury's power to draw the inference that the aggravation of petitioner's tubercular condition, evident so shortly after the accident, was in fact caused by the accident, was not impaired by the failure of any medical witness to testify that it was in fact the cause. Neither can it be impaired by the lack of medical unanimity as to

the respective likelihood of the potential causes of the aggravation, or by the fact that other potential causes of the aggravation existed and were not conclusively negated by the proofs. The matter does not turn on the use of a particular form of words by the physicians in giving their testimony. The members of the jury, not the medical witnesses, were sworn to make a legal determination of the question of causation. They were entitled to take all the circumstances, including the medical testimony into consideration. See Sullivan v. Boston Elevated R. Co., 185 Mass. 602, 71 N.E. 90; Miami Coal Co. v. Luce, 76 Ind. App. 245, 131 N.E. 824. Though this case involves a medical issue, it is no exception to the admonition that, 'It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. *** The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *** Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.' Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29, 35, 64 S.Ct. 409, 412, 88 L.Ed. 520. The proofs here justified with reason the conclusion of the jury that the accident caused the petitioner's serious subsequent illness. See Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493."

GENERAL PRINCIPLES APPLICABLE TO MOTIONS FOR A NEW TRIAL ON GROUNDS OF EXCESSIVENESS

Defendant contends that the jury's award was too generous; plaintiff feels that it was a conservative one. But of course the test is not whether the jury was generous or conservative, but whether their verdict finds reasonable support in the evidence. As Judge Weinfeld stated in the case of *Dagnello v. Long Island Railroad Co.*, 193 F.Supp. 552 at page 553:

> "The primary responsibility for the assessment of damages rests upon the jury, which is allowed a wide area of discretion, particularly where damages are not capable of exact or sliderule determination. Even were the Court to disagree with the amount of the award, it would not be justified in substituting its judgment for that of the combined experience of twelve jurors, unless it 'conscientiously (believed) that the jury has exceeded the bounds of propriety.'[1] In short, the Court's ultimate power to interfere with and set aside a jury judgment on damages should be exercised only if the amount awarded is so excessive as to compel the conclusion that it is the result of passion or prejudice or is shocking to the 'judicial conscience.'

In the instant case as in *Dagnello*, any suggestion that the award rests upon sympathy, passion or prejudice, or was influenced by factors other than a rational consideration of the evidence is repelled by the fact that the jury's deliberations took more time than the trial, itself. There can be no question, nor is any raised, that the jury conscientiously applied itself to the evidence and to the law as instructed by the Court.

THE EVIDENCE ON BEHALF OF EVANS WAS MORE THAN SUFFICIENT TO JUSTIFY A FINDING OF CAUSAL RELATIONSHIP BETWEEN THE ACCIDENT AND THE TORN LATERAL MENISCUS.

(a) The mechanism of the injury is a competent producing cause of this type of pathology. Dr. Mauer testified to this (92) and Dr. Rizzo did not deny it.

(b) The classic symptoms of a meniscus injury (buckling and locking) (93) developed within a few weeks of the accident. (51-53)

(c) Dr. Rizzo, Sr., who did not testify, indicated in his report only that there was no definite evidence of meniscus injury when he examined in September, 1971. (141) He did not perform a McMurray's test, and did not deny the possibility that a meniscus injury existed.

(d) Dr. Mauer found a meniscus injury in April, 1971 (91-92). He testified that it was very difficult to distinguish between a medial and lateral tear. (107)

(e) The orthopedic conference of many specialists in the marine hospital based their diagnoses on a history of over five years buckling and locking and joint pain. They could not be positive before surgery whether the tear was medial or lateral. (A17, A22) Surgery revealed a lateral tear.

Compare all of the above evidence with that found to be sufficient in the *Sentilles* case. The conclusion is overwhelming that the evidence supported the jury's finding. It was up to the jury to decide whether to believe Dr. Rizzo that a medial meniscus injury and a lateral meniscus injury could never be mistaken, or whether they should believe Dr. Mauer and the various inferences to be drawn from the marine hospital records that the clinical findings for both are quite similar.*

* The leading text on orthopedic surgery, Campbell's Operative Orthopedics says (2nd Ed. p. 240):

"Even the most experienced orthopedic surgeon must admit that

It was up to the jury to believe whether or not a man with such an injury could nevertheless continue to work for some five years though enduring pain. In that regard I would commend to the Court's attention the case of *Yates v. Dann*, 124 F.Supp. 125, 167 F.Supp. 179. Yates was injured in April, 1946, but continued to work after his accident until he no longer could physically do so. After four months' treatment he returned to work in December, 1946, and was working until the trial of his case in 1954. Defendant in that case advanced the same argument advanced by counsel for defendant in this case. The court in the *Yates* case said:

(124 F.Supp. at p. 133)

". . . A man may have a physical disability which would justify him in accepting only limited employment with a corresponding lower rate of pay, but because of economic necessity a man may assume duties beyond his physical capacity in order to earn a higher rate of pay. . . ."

The following cases are also relevant to this consideration: (124 F.Supp. 125, 134)

"In *Carter v. United States*, 4 Cir., 49 F2d 221, 223, the Court lay down the rule in these terms:

'The mere fact that a claimant may have worked for substantial periods during the time when he claims to have been permanently and totally disabled is not conclusive against him. The question is not whether he worked, but whether he was able to work, i.e., whether he was able to follow continuously some substantially gainful occupation without material injury to his health.

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the differential diagnosis of various types of internal derangements of the knee presents many pitfalls. The surgeon who can keep his diagnostic error within the limits of 10-20 per cent is a particularly astute diagnostician."

and at p. 243:

". . . Curiously, the symptoms of lesions of the lateral cartilage frequently lead one to believe that the tear is on the medial side."

Of course, the fact that a man does work is evidence to be considered by the jury as tending to negative the claim of disability; but the fact that he works when physically unable to do so ought not defeat his right to recover if the jury finds that such disability in fact existed.'

"The same rule was enunciated in *United States v. Phillips*, 8 Cir., 44 F2d 689, 691:

'Some persons, who are totally incapacitated for work, by virtue of strong will power may continue to work until they drop dead from exhaustion, while others with lesser will power will sit still and do nothing. . . .' "

THE KNEE INJURY, ALONE, WOULD SUPPORT THE VERDICT OF $60,000.00.

a) $5,000 Loss of Earnings

At the time of the accident in 1968 plaintiff was earning approximately $1,000 a month, plus vacation pay. Prior to his surgery, he was under treatment of the Public Health Service and not fit for duty for a period of about five weeks. He testified that at other times he worked at the rating of able-bodied seaman which payed a lesser amount of money, and that at times he did not work in order to rest his knee. By 1974 the average monthly earnings of a bosun had increased to approximately $1400 per month, plus vacation pay. As a result of the surgery the plaintiff has been disabled for a period of six months until his trial on October 2. Even disregarding the periods when plaintiff was on the beach and resting his knee, but not getting active medical treatment, the evidence justifies loss of earnings well in excess of $5,000.

(b) With regard to the award of $55,000, Dr. Mauer testified that plaintiff would probably never be able to return to the duties of a seaman based on the condition of his knee alone (105). He has suffered a loss of earning capacity of at least $15,000 a year;

he had a work expectancy of eight years, so that the loss of earning capacity, alone, would be in the area of $100,000.

Regarding the element of pain and suffering, the evidence certainly justified an award of approximately $25,000 for plaintiff's pain and suffering for the 5½ years since his accident. Although comparison of damages awarded in other cases is in no way binding on this case or the jury, since each case must be decided upon its own facts, in a separate appendix there are listed certain awards which may give a basis for comparison as far as the issue of pain and suffering is concerned.

THE EVIDENCE WAS SUFFICIENT, INDEED UNCONTRADICTED, THAT THE HEART ATTACK WAS A RESULT OF THE SURGERY.

(a) The discharge note from the Staten Island Marine Hospital (A29) indicated that both urinary retention and myocardial infarct were complications of the surgery to plaintiff's knee. (103-104).

(b) The report of Dr. Cutler, a qualified internist, indicated that in his opinion the myocardial infarct was related to the surgery. (161)

It is clear that the jury's verdict was amply supported by the evidence, indeed modest even based on the knee injury alone with its consequent pain and suffering and disability. When the heart attack is considered, the amount awarded seems less than modest. In any event, the trial judge should not have ordered a new trial on the grounds of excessiveness.

POINT II

WHERE, AS HERE, THE PLAINTIFF HAS ACCEPTED THE REMITTITUR UNDER PROTEST, THE JUDGMENT IS APPEALABLE.

This precise question, under different procedural circumstances, was presented to a panel of this Court in the case of *Reinertsen v. George W. Rogers Construction Corp.*, — F2d —. I respectfully refer to Point II of Judge Feinberg's opinion in that case for a full discussion of this issue. For the Court's convenience, that opinion has been reproduced in a separate Appendix to this brief.

POINT III

IT WAS AN ABUSE OF DISCRETION FOR JUDGE CANNELLA TO ORDER A NEW TRIAL ON THE ISSUES OF BOTH COMPARATIVE NEGLIGENCE AND DAMAGES AFTER JUDGE SOLOMON HAD DIRECTED A NEW TRIAL ON DAMAGES ALONE.

Judge Cannella did not preside at the first trial in October 1974. His only knowledge of that trial was from "looking over the case" on the first night of the trial. If he had had sufficient time, and if the trial minutes had been available to him, and if he had read the entire minutes, he would have discovered that not once during the entire trial did defense counsel even suggest to the jury that Evans was guilty of negligence contributing to his accident. The opening statement of defense counsel, as well as his summation, are contained in the appendix. The only remarks concerning the accident of May 21, 1968 are the following:

> "Now, bear this in mind, it is our contention that not every accident produces an injury. We want you to listen

very carefully to what happened to Mr. Evans. We do not deny—the defendant in this case does not deny Mr. Evans fell on May 21st or May 28th 1968. No question about it. He fell on the number 2 hatch, no question about that. He fell because he was doing his duty in stretching the wire. He did his job and he hit his knee. But Mr. Evans worked for six years thereafter on vessels. We will prove to you that he worked for Sealand, which is a shipping company; he worked for Seatrain; he served on the Calmar. Now, we think it is sort of shocking that a six-year period goes by and we are now being asked to be held responsible for a fall to Mr. Evans. Mr. Evans has to prove that that fall resulted in this knee injury which he was operated on in 1974 in the United States Public Health Service in Staten Island." (22-23)

"We have to keep dates in mind in this case. They are so critical. We have May 21st, 1968. Mr. Evans testified that on that date he was performing duties which the ship's officer directed him to perform. He was working on the number 2 hatch. And, in doing so, he had to leap across an opening and fell and hit his knee.

Now, we remember we have not denied from the outset of this case that Mr. Evans hit his knee on May 21st, 1968. We have attempted to show you through cross-examination and the direct examination that the injury complained of now is not the result of that fall" (162-163)

Having defended the case on the basis of lack of causal relationship alone, defendant should not have been permitted to litigate at a second trial the issue of contributory negligence which it had abandoned. This was particularly prejudicial to the plaintiff because two vital exhibits, 14 and 12, which depicted the area and equipment involved, had been left in the courtroom after the first trial and were lost.

The amendment of the order for a new trial so as to include

the issue of contributory negligence came after the opening statements and the direct examination and part of the cross examination had been completed. Judge Cannella's action was an abuse of discretion, if indeed he had the power to do so.

POINT IV

JUDGE CANNELLA LACKED THE POWER TO OVERRULE JUDGE SOLOMON AND ORDER THAT THE ISSUE OF COMPARATIVE NEGLIGENCE BE SUBMITTED TO THE SECOND JURY

This Court has observed, in the case of *National Silver Co. v. Federal Trade Commission*, 88 F.(2d) 423, 425:

> "It is well established that a judge may not overrule the decision of another judge of co-ordinate jurisdiction made in the same case. The law enunciated by the first judge is not merely his individual opinion, it is the law of the District Court, to be followed, upon similar facts, until a different rule is laid down by a court of superior jurisdiction . . . . Such a rule is essential to an orderly and seemly administration of justice in a court composed of several judges . . . . "

The principle had been enunciated earlier by the Court in *Commercial Union of America, Inc. v. Anglo South American Bank*, 10 F2 937, 941, and was again reaffirmed by Judge Learned Hand in *Potts v. Village of Haverstraw*, 93 F2d 506, 509 with this comment: "It is of course essential to any orderly conduct of an action or suit, that, at least unless upon the most extreme provocation, a second judge shall not vacate any order of an earlier judge."

The rule has usually been honored by district judges in this circuit. c.f. *North Amer. Phillips Co. v. Brownshield*, DCNY 1953, 111 F Supp. 762. It should have been followed by Judge Cannella in this case.

POINT V

JUDGE CANNELLA SHOULD HAVE GRANTED PLAINTIFF'S MOTION FOR A MISTRIAL

Assuming that Judge Cannella had the power to overrule Judge Solomon's order and require a new trial to include the previously abandoned issue of comparative negligence, and further assuming that such action was not an abuse of discretion (two very formidable hurdles), at the very least plaintiff was entitled to a mistrial in order to prepare evidence on that issue. Certainly plaintiff was surprised, as he had every right to rely on the determination by Judge Solomon that the new trial would be on damages only (A13). A jury had only been empanelled the previous afternoon, so that only half a day of work would have been lost. Indeed, Judge Cannella offered to declare a mistrial (A37). Plaintiff accepted (A38) the Court declared a mistrial (A38), then reversed himself when defendant objected (A39). Judge Cannella then stated that he would put the case over to the following Monday (it being then Thursday). At approximately noon, Judge Cannella stated that the trial would resume at 2:15.

Both the Court and defense counsel seemed to believe that comparative negligence could be determined without proof as to the degree of defendant's fault (A35-A39). This, of course, is not true. The greater the defendant's negligence, the smaller would be the percentage of plaintiff's fault, if any. This aspect of the case could not be prepared in two hours, especially without vital exhibits depicting the area or the equipment. A mistrial, or at least a continuance until Monday should have been granted in the interest of justice.

CONCLUSION

The Order of remittitur should be reversed, and judgment entered in favor of the plaintiff in the amount of $60,000 in accordance with the unanimous verdict of the jury.

Respectfully submitted,

PAUL C. MATTHEWS
Attorney for Appellant,

Appendix

In *Chambers v. Tobin*, DC DC January 1954, 118 F.S. 555, over 20 years ago, an award of $30,000 for past and future pain and permanent deformity and disability of the left forearm and wrist of a 55-year-old woman was held not to be excessive.

In *La Capria v. Compagnie Maritime Belge*, (CA 2d 1970) 427 F2d 244, Judge Edelstein's award of $158,000 for 158 weeks pain and suffering was affirmed by the Court of Appeals.

In *Williamson v. Compania Anonima*, (CA 2d 1971) 446 F2d 1339, an award of $47,000 was affirmed by the Court of Appeals for a 63-year-old longshoreman for chronic olecranon bursitis of the right elbow.

In *Tinnerholm v. Parke, Davis & Co.*, (CA 2d 1969) 411 F2d 48, an award of $400,000 for pain and suffering to a retarded child was affirmed.

In *Wright v. Charles Pfizer & Co.*, DC SC 1966, 253 F.S. 811, an award of $150,000 was made for traumatic epilepsy requiring the plaintiff to take the drug Dilantin to prevent seizures.

In considering all of the above awards, the decreased value of the dollar with recent inflation must of course be considered, as money is only of value for what it may purchase.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 564—September Term, 1974.

(Argued April 10, 1975 Decided July 3, 1975.)

Docket No. 72-2155

ALF REINERTSEN,

Plaintiff-Appellant,

v.

GEORGE W. ROGERS CONSTRUCTION CORPORATION,

Defendant-Appellee.

Before:

FRIENDLY and FEINBERG, *Circuit Judges*, and LASKER, *District Judge.**

Appeal by plaintiff from judgment in his favor after two trials in the United States District Court for the Southern District of New York, the first before Walter R. Mansfield, *J.*, who ordered a new trial unless plaintiff filed a remittitur of $30,000 from a verdict of $75,000, and the second before Marvin E. Frankel, *J.*, who refused to set aside a $16,000 verdict as inadequate.

Affirmed.

PAUL C. MATTHEWS, New York, N.Y., *for Plaintiff-Appellant.*

* Of the United States District Court for the Southern District of New York, sitting by designation.

JOSEPH ARTHUR COHEN, New York, N.Y. (Alexander, Ash, Schwartz & Cohen; Sidney A. Schwartz, Irwin H. Haut, on the brief), *for Defendant-Appellee.*

FEINBERG, *Circuit Judge:*

Plaintiff Alf Reinertsen's[1] left thumb was crushed by a pile driver in January 1967, while he was working as a dock builder for defendant George W. Rogers Construction Corporation. Reinertsen, who was 50 years old when the accident occurred, was hospitalized for about 16 days and lost four months of work. Attempts to save the thumb failed, and most of it was amputated. Reinertsen returned to work for defendant, continuing for about three years. He allegedly left his job because his thumb was highly sensitive to the cold and damp conditions in which he had to work, but found other employment as a marine construction worker. Reinertsen's earnings remained virtually the same in all the years after the accident, except for a slight drop in the year he left defendant's employ.

Plaintiff brought an action in the United States District Court for the Southern District of New York, claiming that defendant was negligent in various respects and had furnished an unseaworthy vessel. After a jury trial before then District Judge Walter R. Mansfield, plaintiff obtained a verdict of $75,000. Finding the award "grossly excessive," Judge Mansfield granted defendant's motion for a new trial on damages alone unless plaintiff remitted $30,000 of the verdict and consented to a judgment of

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1 We were informed by letter from counsel for plaintiff shortly before argument that although Reinertsen has died, formal substitution of parties has not yet been made.

$45,000. When the required agreement by plaintiff was not forthcoming, the judge ordered a new trial on damages alone. This trial before Judge Marvin E. Frankel resulted in a verdict of $16,000. Plaintiff moved for a new trial on the ground that the verdict was inadequate, but the motion was denied. This appeal followed, in which plaintiff challenges both the order of Judge Mansfield granting a new trial after the first verdict and the order of Judge Frankel refusing to do so after the second, which we discuss in Part I of this opinion. Plaintiff also seeks to raise an important question of appellate jurisdiction which we discuss in Part II.

I.

Treating the case in the procedural manner traditional in this circuit, we find little difficulty in affirming the judgment. While plaintiff is entitled to have us review Judge Mansfield's order granting a new trial unless plaintiff filed a remittitur of $30,000, *Taylor* v. *Washington Terminal Co.*, 409 F.2d 145, 147 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 835 (1969), we find no sufficient basis for upsetting the judge's ruling that "under all the circumstances," "the $75,000 verdict was clearly excessive and . . . a verdict of $45,000 would represent a figure at the upper limits of reason." It is true that, for reasons pointed out in *Taylor* v. *Washington Terminal Co., supra*, 409 F.2d at 147-49, less appellate deference need be accorded to a ruling of the trial judge which is opposed to the verdict than to a ruling which is in support of it, as in *Dagnello* v. *Long Island R.R.*, 289 F.2d 797, 806 (2d Cir. 1961), and *Gruenthal* v. *Long Island R.R.*, 393 U.S. 156 (1968). See C. Wright, Federal Courts 422 (2d ed. 1970). But the *Taylor* opinion acknowledged that "The trial judge's view that a verdict is outside the proper range deserves considerable

deference" and concluded that an appellate court should "reverse the grant of a new trial for excessive verdict only where the quantum of damages found by the jury was *clearly* within 'the maximum limit of a reasonable range.'" 409 F.2d at 149 (emphasis in original). See also *Cosentino* v. *Royal Netherlands S.S. Co.*, 389 F.2d 726 (2d Cir.), *cert. denied*, 393 U.S. 977 (1968). Here, in contrast to *Taylor*, the trial judge did not abuse his discretion in concluding that, in view of the absence of significant economic loss, a $75,000 verdict was clearly beyond the maximum limit of a reasonable range and that $45,000 would constitute such a maximum.

Even more plainly, under *Dagnello* and *Grunenthal*, we cannot properly interfere with Judge Frankel's refusal to set aside the $16,000 verdict at the second trial as inadequate. He found that verdict was "in the range of the jury's allowable discretion on this record," although he noted it was "possibly smaller than I would have returned." We agree that this was hardly a generous verdict. But, bearing in mind the restraint with which a trial judge must treat a verdict, and, in turn, the deference which we owe to a ruling supporting one, we again find no abuse of discretion. This verdict was not grossly and palpably inadequate. See *Caskey* v. *Village of Wayland*, 375 F.2d 1004, 1007 (2d Cir. 1967).

II.

This, however, is not the end of the matter. After Judge Mansfield set aside the $75,000 verdict as too high and ordered a new trial unless plaintiff remitted $30,000, plaintiff, in a memorandum in support of a motion for reargument, indicated that if the judge should adhere to his decision, plaintiff would be willing "to waive . . . his right to a new trial and to submit, under protest, to the reduced judgment with a view to eliminating the necessity for a

new trial and appealing directly from the reduced judgment." Judge Mansfield entered an order denying reargument; he adhered to his "decision to the effect that the jury's award was grossly excessive and that defendant's motion for a new trial is granted unless the plaintiff *agrees* to remit $30,000 of the $75,000 awarded" (emphasis in original) but did not discuss plaintiff's alternative suggestion. Plaintiff apparently then submitted a paper to the district court stating that he "hereby waives his right to a new trial so that judgment may be entered in favor of the plaintiff in the amount of $45,000.00 without, however, waiving his right to appeal from said judgment." In a petition filed with this court shortly thereafter, plaintiff alleged that the district court had "refused to enter judgment in the form professed [sic] by the plaintiff" and sought "a writ of mandamus directing the Honorable Court to enter the $45,000 award in such form that plaintiff can appeal from such judgment." The petition was denied. *Reinertsen* v. *Mansfield*, 71-1589 (June 22, 1971). Plaintiff now claims that in light of his proffered waiver he should have been allowed to appeal on the basis that he proposed and that, even though we decline to reverse Judge Mansfield's order, he should still receive the $45,000 he was willing to accept if Judge Mansfield's direction of a remittitur withstood appellate review rather than the $16,000 awarded at the second trial.

Under usual federal practice, an order granting a new trial is not appealable, *Compagnie Nationale Air France* v. *Port of New York Authority*, 427 F.2d 951, 954 (2d Cir. 1970), even if the new trial results from a refusal to accept a remittitur, see 9 J. Moore, Federal Practice ¶ 203.06, at 721 n. 30 (1973). Nor has the traditional rule permitted a plaintiff who filed a remittitur to appeal the judgment; the theory has been that plaintiff consented

to the reduced judgment. See 11 C. Wright & A. Miller, Federal Practice and Procedure § 2815, at 106 (1973); 9 J. Moore, supra, ¶ 203.06, at 721 n. 31; *S. Birch & Sons* v. *Martin*, 244 F.2d 556, 562 (9th Cir.), cert. denied, 355 U.S. 837 (1957). Thus, the only course generally thought to be available to a plaintiff to procure review of an order granting a new trial in the absence of a remittitur was to do what was done here, namely, to undergo the new trial and, if the result was unsatisfactory, bring up the propriety of the remittitur on appeal from the final judgment. If the appellate court held the new trial should not have been ordered, the original verdict would be restored. If it held to the contrary, the verdict on the second trial, if otherwise unassailable, would be the basis for judgment.

However, after some wavering partially traced in 9 J. Moore, supra, ¶ 203.06 at 722, the Fifth Circuit has arrived at the position that "if the plaintiff accepts the remittitur under protest, the final judgment entered thereon would be appealable, and the order requiring remittitur could be reviewed in that appeal." *Wiggs* v. *Courshon*, 485 F.2d 1281, 1283 (5th Cir. 1973). See also, e.g., *United States* v. *1160.96 Acres of Land*, 432 F.2d 910 (5th Cir. 1970); 11 Wright & Miller, supra, § 2815, at 105-06 & n. 10.[2]

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2 We note that there are old Supreme Court cases which appear to forbid appeals or cross-appeals by plaintiffs who have filed remittiturs. Two of these cases, in which the plaintiff appealed, may be distinguishable on their facts. In *Kennon* v. *Gilmer*, 131 U.S. 22 (1889), a territorial supreme court had erroneously reduced the judgment entered on the jury verdict without giving the plaintiff the option of accepting the remittitur or having a new trial. The Supreme Court held this procedure violated the seventh amendment. In *Lewis* v. *Wilson*, 151 U.S. 551, 555 (1894), the plaintiff clearly did not accept the remittitur under protest, but rather "received payment and acknowledged full satisfaction." The other two cases, however, *Woodworth* v. *Chesbrough*, 244 U.S. 79 (1917), and *Koenigsberger* v. *Richmond Silver Mining Co.*, 158

The Sixth Circuit has approved the practice in a diversity case, where state procedure allowed this, on the basis that the Erie doctrine so required. *Mooney* v. *Henderson Portion Pack Co.*, 334 F.2d 7 (6th Cir. 1964). We find this rationale questionable, as did the Seventh Circuit, *Dorin* v. *Equitable Life Ins. Soc'y*, 382 F.2d 73, 78-79 (7th Cir. 1967). There, the court adhered to the orthodox rule previously followed in *Casko* v. *Elgin, J.&E. Ry.*, 361 F.2d 748, 751 (7th Cir. 1966), although the opinion writer, Judge Fairchild, expressed a personal preference for "a rule more liberal to the plaintiff." The Sixth Circuit, however, remains unrepentent. *Manning* v. *Altec, Inc.*, 488 F.2d 127, 130-31 (6th Cir. 1973).

The only cases touching on the problem in this circuit have arisen in the context of attempted cross-appeals by plaintiffs (who had accepted a remittitur) after defendants had appealed the judgments for usual reasons. In this situation, this court has taken apparently contradictory positions on the allowability of the cross-appeal.[3] In

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U.S. 41 (1895), clearly prohibit cross-appeals by plaintiffs who have accepted remittiturs, whether protesting or not. It is not clear from the Fifth Circuit's discussion how it distinguishes these precedents. See *United States* v. *1160.96 Acres of Land*, supra, at 911-12; 6A J. Moore, Federal Practice ¶ 59.05[3], at 59-63 (2d ed. 1948). See also *Thomas* v. *E.J. Korvette, Inc.*, 329 F. Supp. 1163, 1171 (E.D. Pa. 1971), rev'd on other grounds, 476 F.2d 471 (3d Cir. 1973).

A remittitur under protest was also permitted by a district court in Pennsylvania, *Thomas* v. *E.J. Korvette, Inc.*, supra, 329 F. Supp. at 1170-71. For a survey of state practice, see Note, Civil Procedure—Remittitur—Remitting Parties' Right to Cross-Appeal, 49 N.C. L. Rev. 141 (1970).

3 Some state courts apparently allow appeals from remittiturs in cases of this sort. See Note, Remitting Parties' Right to Cross-Appeal, supra. We note that the argument for allowing plaintiff to cross-appeal may be slightly stronger than for allowing plaintiff to appeal directly from a remitted judgment. In the former situation, the case will have to be considered anyway by the appellate tribunal on defendant's appeal. On the other hand, if a plaintiff cross-appeals from a judgment he has accepted without protest, he is in a less equitable posture.

Burris v. *American Chicle Co.*, 120 F.2d 218, 223 (2d Cir. 1941), an opinion by Judge Chase expressed reservations about reviewing a plaintiff's cross-appeal from a judgment entered after remittitur, but then dismissed the cross-appeal on the merits because the trial court had not abused its discretion. However, in *Mattox* v. *News Syndicate Co.*, 176 F.2d 897, 904 (2d Cir.), cert. denied, 338 U.S. 858 (1949), where also the plaintiff had actually accepted the reduced judgment, with two of the judges in *Burris* sitting (Swan and Clark) and Judge Learned Hand writing the opinion, appealability was rejected in a cryptic paragraph.

In *Wiggs* v. *Courshon, supra,* 485 F.2d at 1283, Judge Roney made the following explanation why allowing the plaintiff to appeal where he accepts the remittitur under protest does not offend the policy of the "final judgment" rule against piecemeal appeals:

> If the remittitur was in order, the plaintiff has agreed to it, the judgment would be final, and no new trial would be required. If the trial court erred in ordering the remittitur, the appellate court could set aside the judgment and order that a judgment be entered on the jury verdict. Again, no new trial would be necessary to conclude the litigation.

There is, of course, another possibility, namely, that the appellate court will reduce the remittitur. But the plaintiff's consent to the larger remittitur should certainly cover the smaller. Plaintiff contends that, with the policy of the final judgment rule thus satisfied, the interests of justice will be served by allowing an immediate appeal under these circumstances. If the plaintiff succeeds, the verdict will be restored in whole or in part without need for the parties to undergo a second trial. If the plaintiff fails, there

will be a judgment within what the trial judge considered to be the range of reason. Defendant, however, points out that the jury, if not prejudiced, at least must have been wrong-headed, and that defendant should not be placed in a position where if the remittitur is held proper, a plaintiff who was unwilling to accept it without an appeal will always get the maximum that a jury could reasonably fix rather than what a wiser jury might in fact award.

While these seem to be the crucial considerations, a decision to depart from the traditional practice may fairly take some account of the effect of the change on the workload of the courts. Defendant contends that now almost all cases end with acceptance of remittiturs by plaintiffs, but the proposed practice of allowing plaintiffs to accept remittiturs under protest will increase the burdens on the courts of appeals. The increase will be the number of cases in which trial judges grant new trials subject to remittiturs since plaintiffs will have nothing to lose by accepting the remittitur under protest and then appealing; they will be assured of a minimum judgment, which the trial judge has already determined is the maximum legal recovery, and, if successful on appeal, they may still get all or part of the amount to be remitted as well. Plaintiff disputes this, arguing that the chances of upsetting the trial judge's ruling are poor since the only issue on appeal would be whether the trial judge abused his discretion in ordering a new trial if plaintiff refused to accept a remittitur. See *Bonura* v. *Sea Land Service, Inc.*, 505 F.2d 665, 669-70 (5th Cir. 1974). Thus, an appeal will be taken only when the trial court's action seems flagrantly wrong; this is said to be particularly true of personal injury suits, undoubtedly the largest element in the problem, because most of them are prosecuted on a contingent fee basis and it would be unprofitable for plaintiffs' lawyers to prosecute appeals

with dubious chances of success. *Sed quaere.* There is also the further deterrent that plaintiffs following the contemplated procedure will be giving up a little something —the chance of a verdict on the new trial even higher than on the first, one which a judge would be unlikely to disturb. Plaintiff's argument as to lack of increase of workload gains some credence from the enthusiasm for the practice in the busiest circuit of all; the abundant statistics maintained by the Fifth Circuit should shed light upon the proportion of cases of this sort in which appeals are taken. Plaintiff adds that if there should be an increased burden on the courts of appeals, and it seems clear there would be some, this would be more than counterbalanced by the relief afforded to the district courts from having to conduct new trials in cases like this one where a plaintiff is unwilling to accept a remittitur without appellate review. Defendant responds that any improvement would be trifling, since remittiturs are almost always accepted. A study of our own district courts should be able to develop figures on this point.

Apart from the question whether Supreme Court decisions permit us to adopt the Fifth Circuit practice, see note 2 supra, we are reluctant to depart from the traditional rule without better answers to the various questions posed above. To be sure, we could not avoid decision if the issue were squarely before us. But it is not. Even on plaintiff's theory, we see no persuasive reason why he could not have accepted the remittitur and then filed a notice of appeal, relying on the record he had already made to establish that his acceptance was "under protest." Instead, plaintiff sought the issuance of mandamus,[4] a remedy granted by this court only under exceptional circumstances.

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4 The petition for mandamus did not bring to the court's attention the decisions in the Fifth Circuit or the discussion by the text writers.

Having failed to appeal from the earlier order and having had a new trial at which he might have obtained a verdict higher than the amount to which Judge Mansfield required a remittitur, plaintiff cannot now be allowed to treat Judge Mansfield's order, augmented by plaintiff's proffered acceptance under protest and waiver of a new trial, as a final judgment. This is particularly so since the time for appealing from such a judgment had long since expired when the instant notice of appeal was filed. We thus must leave the interesting problem canvassed here to another day.

Affirmed.

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 24 day of Nov 1975 deponent served the within proof upon:

Foley, Lardner & Hayes

attorney(s) for Appellee

in this action, at 150 Battery Pl
N.Y.C. 10004

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 24
day of Nov, 1975.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976